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80-320

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

THOMAS F. COSTELLO,
PETITIONER,

v.

BOARD OF APPEALS OF THE TOWN
OF CONCORD,
RESPONDENT.

Petition for Writ of Certiorari to the Appeals Court of Massachusetts.

THOMAS F. COSTELLO, PRO SE,
178 Bedford Street,
Lexington, Massachusetts 02173.
(617) 862-3911

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether an unconstitutional taking of property without compensation has occurred where it is undisputed that a landowner cannot use its property for any use permitted by the flood plain zoning district in which it is located?

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BOARD OF APPEALS OF THE TOWN
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Petition for Writ of Certiorari to the Appeals Court of Massachusetts.

The petitioner, Thomas F. Costello, the sole legal and beneficial owner of the S. Kemble Fischer Realty Trust, respectfully prays that a writ of certiorari issue to review the opinion of the Appeals Court dated March 28, 1980, together with the judgment ultimately entered in this proceeding on June 3, 1980.

Opinions Below.

The opinion of the Appeals Court of Massachusetts, reported at Massachusetts Appeals Court Advance Sheets (1980) 637, appears in the appendix hereto (App. 22a-27a). The order of the Supreme Judicial Court of Massachusetts denying the petitioner's application for further appellate review, reported at Massachusetts Advance Sheets (1980) 1432, appears in the appendix hereto (App. 28a). The unreported decisions of the Concord Board of Appeals and the Superior Court Department of Middlesex County also appear in the appendix hereto (App. 1a-7a; 12a-21a).

Jurisdiction.

The judgment of the Appeals Court of Massachusetts was entered on June 3, 1980, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions and Zoning By-Law Involved.

United States Constitution, Amendment V:

> ". . . nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, § 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The full text of that portion of the Concord Zoning By-Law establishing the Flood Plain Conservancy District in that town is set forth in the appendix hereto (App. 8a-11a).

Statement of the Case.

As the owner of lots 1-B, 2, 4 and 7 located on or about Main Street and Pond Lane in West Concord, Massachusetts, near Damon Mill, the petitioner, Thomas F. Costello, as the sole legal and beneficial owner of S. Kemble Fischer Realty Trust ("Fischer"), sought a special permit from the Concord Board of Appeals ("the board") to excavate, grade and fill portions of this land that were located in the so-called flood plain conservancy district ("FPCD").[1] In support of its request, Fischer presented evidence to the board regarding field percolation tests and compensatory water calculations to show that the land was not subject to flooding and to demonstrate that filling the area would not create a drainage problem either for these lots or for adjacent land. Moreover, evidence was proffered to show the high likelihood of a threat to the public health and safety if the lots were left unfilled.

Importantly, Fischer was further able to show that the proposed uses of these lots after the excavation, grading and filling was for recreation and access, both of which were permitted as

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[1] This permit was requested by Fischer pursuant to G.L. c. 40A, § 4, and section 4.2B(7) of the Concord zoning by-law (App. 10a).

a matter of right within the FPCD by the zoning by-law, were not possible without a reasonable amount of landfill and grading. In addition, it was shown that each of the underlying zoning districts[2] also allowed the uses proposed by Fischer which filling and grading the lots would permit, i.e., recreation (as to lots 1-B and 4) and access (as to lot 2). Accordingly, the uses to be employed by Fischer for all the lots *after* filling were the same uses as those permitted as a matter of right *before* filling but the proposed uses were not at all possible without excavation, grading and filling.

Nine months after its public hearing on the matter, the board issued its decision denying Fischer's request for a special permit to grade and fill its land (App. 1a-7a). Fischer thereafter brought this civil action against the board in the Superior Court Department of Middlesex County challenging the board's action as capricious, arbitrary and in violation of the Fourteenth Amendment to the United States Constitution. Specifically, Fischer alleged that because the board's denial of the special permit prevented it from putting its land to uses which are expressly permitted as a matter of right under the zoning by-law, the board's action amounted to the denial of due process and the taking of its property without just compensation.[3] In December, 1977, the case was tried in the Superior Court without a jury. One year later, the trial judge issued his twice-amended but final findings of fact, rulings of law and decision (App. 12a-21a).

In affirming the board's decision denying Fischer a special permit, the trial court expressly found as a fact that "Fischer

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[2] At all relevant times, were it not for the existence of the FPCD, lots 1-B and 4 would be entirely within an Industrial District and lot 2 would be partially within a Business District and partially within a Residence C District.

[3] Fischer also submitted to the trial judge requests for findings of fact and for rulings of law consistent with its claim that an unconstitutional taking had occurred. See Mass.R.Civ.P. 52(a).

did show that it could not use its land as it is now for access, general recreation or other uses permitted within the Flood Plain Conservancy District" (App. 18a). Despite this finding, the court concluded as a matter of law that this preclusion of any practical use of Fischer's land (absent filling and grading) did not amount to an unconstitutional taking of its property without compensation because "the right of the individual must be subordinate to the health and safety of the community and such subordination is not a taking without compensation and without due process so as to violate the Fourteenth Amendment to the United States Constitution" (App. 21a).[4]

On appeal from this ruling, Fischer contended in its brief and at oral argument before the Appeals Court that the trial judge had committed a procedural irregularity in finding facts and drawing conclusions of law which were inconsistent with Fischer's Rule 36 requests for admissions and the board's responses thereto (App. 22a-26a).[5] Its only substantive argument actually addressing the board's denial, however, was bottomed on the constitutional claim that the board's action amounted to an unconstitutional taking of its property without compensation.[6]

After disposing of Fischer's claims of procedural impropriety, the Appeals Court considered the constitutional argument

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[4] Unlike the Appeals Court opinion, discussed *infra*, the trial judge's decision also rested on the other substantive grounds that the board's denial of the special permit to Fischer: (1) did not exceed its statutory authority; and (2) was not whimsical, capricious or arbitrary (App. 16a-19a).

[5] As a corollary to this claim, Fischer also contended that the trial judge erred in failing to grant its requests for findings of fact and rulings of law which were consistent with its earlier Rule 36 requests for admissions and the board's reponses thereto.

[6] This substantive claim of unconstitutionality was repeated in Fischer's reply brief. A final argument was made by Fischer that all three of its lots qualify for the thirty-foot exemption contained in section 1.B of the zoning by-law.

(App. 26a-27a). Although the opinion briefly adverted to the trial judge's finding that Fischer could not presently use its land for any use permitted as of right in the FPCD without filling and grading, it instead stressed a further ruling of law by the lower court that the land was "not worthless" (App. 26a). Recasting this ruling of law into a factual finding "that the locus was not without residual economic utility," the intermediate appellate court then surmised that Fischer could use this land in the FPCD (which had already been found by the lower court to be unfit for every use in that zoning district) "for some purpose which did not require filling, for example to enhance that portion of its land which is outside the flood plain" (App. 26a).[7] It thus affirmed the trial court's determination that no unconstitutional taking had occurred (App. 26a-27a).[8]

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[7] The Appeals Court also rejected Fischer's final argument that its lots qualified for the thirty-foot exemption contained in section 1.B of the zoning by-law (App. 27a).

[8] The constitutional determination by the Appeals Court that no taking had occurred was its primary justification for upholding the board's denial of the special permit. No other argument by Fischer on appeal so directly or substantively challenged the board's decision and the trial court's ratification thereof; Fischer's other arguments before the intermediate appellate court were addressed mainly to claimed procedural improprieties concerning the use and impact of its requests for admissions. In this sense, then, the Appeals Court determination that both the board and the trial judge had acted properly in first denying, and then ratifying the denial of, the special permit rested squarely on federal constitutional considerations. No adequate, independent state ground was relied upon or even referred to by court. See and compare note 4, *supra*.

In the alternative, even if there were an independent state ground inhering somewhere in the Appeals Court decision to justify the board's action and the lower court's ratification thereof, it could not have been adequate to support the state court judgment. See generally *First National Bank* v. *Anderson*, 269 U.S. 341, 346 (1926). In any event, if this Court is unable to discover an adequate state ground to support the state court judgment, "it will be presumed that the State court based its judgment on the law raising the Federal

Pursuant to Massachusetts Rule of Appellate Procedure 27.1, Fischer then applied for leave to obtain further appellate review of this decision by the full Supreme Judicial Court. The basis of Fischer's application was its contention that the Appeals Court had unjustly reread the trial judge's plain findings establishing the uselessness of its land in the FPCD without excavation, fillings and grading to mean that the land "was not without residual economic utility." In that process, Fischer claimed the court had ratified the unconstitutional dedication of this land to the public domain without just compensation.[9] On May 29, 1980, the Supreme Judicial Court denied Fischer's application for further appellate review (App. 28a). This petition by Fischer that a writ of certiorari issue to the Appeals Court followed.

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question, and this court will then take jurisdiction." *Klinger* v. *Missouri*, 80 U.S. (13 Wall.) 257, 263 (1870). Moreover, the mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973). See also *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967).

[9] In so doing, Fischer contended that a violation of the Fourteenth Amendment to the United States Constitution had been established and that the Supreme Judicial Court should therefore exercise its discretion to grant the application for further appellate review.

Fischer, of course, was bound to seek further appellate review from the highest court in Massachusetts so as to confer jurisdiction upon this Court under 28 U.S.C. § 1257(3) to review the opinion of the Appeals Court, an intermediate state appellate tribunal. See *Benton* v. *Maryland*, 395 U.S. 784, 786 (1969); *Stratton* v. *Stratton*, 239 U.S. 55, 59 (1915).

Reasons for Granting the Writ.

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT WHICH ESTABLISH THE STANDARDS FOR DETERMINING WHEN AN UNCONSTITUTIONAL TAKING WITHOUT COMPENSATION HAS OCCURED.

In concluding that no unconstitutional taking had occurred, the Appeals Court considered it insignificant that Fischer, as the trial judge had found, could not use its land for *any* purpose permitted by the flood plain zoning by-law. Having thus ignored this plain finding of the land's uselessness, the appellate court then focused on the trial judge's ruling of law that the land was not, however, rendered "worthless," transforming it into a positive finding that the property possessed some "residual economic utility" (App. 24a). It was upon this "finding" that the court then bootstrapped yet another finding of fact that Fischer's flood plain land could, after all, be used to "enhance" that portion of Fischer's property lying outside the flood plain (App. 26a).[10] It now is clear, then, that the trial and appellate courts of Massachusetts will refuse to declare that an unconstitutional taking of property has occurred by the operation of a zoning regulation, even though the land affected cannot be used for any purpose permitted as of right in the zoning district, as long as the land has not been rendered "worthless." Quite apart from the unsubstantiated appellate factfinding involved here, Fischer submits that this unduly biased method of analysis employed by the Appeals Court is not in accord with this Court's precedents establishing

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[10] The opinion failed to identify any record support for this "finding" (App. 25a). Moreover, the court did not elaborate on how the flood plain land could enhance the adjacent property. Nor did the opinion consider the flood plain land's "residual economic utility" if Fischer did not own the adjacent property.

standards for determining when an unconstitutional taking of property without compensation has occurred. Moreover, contrary to those precedents, the Appeals Court's decision effectively pronounces that henceforth in Massachusetts, title to real property will no longer be held in fee simple but rather in trust for whatever purposes, real or imagined, a court can later envision as necessitated by the zoning regulation in issue.

As a general matter, this Court has adopted an *ad hoc*, case by case analysis of taking claims with decisions for the most part dependent on the facts of each controversy. See, e.g., *Agins* v. *City of Tiburon*, ____ U.S. ____, 100 S.Ct. 2138, 2141 (1980); *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174-175 (1979); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-124 (1978). "Although no precise rule determines when property has been taken . . ., the question necessarily requires a weighing of private and public interests." *Agins* v. *City of Tiburon*, *supra*, ____ U.S. at ____, 100 S.Ct. at 2141 *citing Kaiser Aetna* v. *United States*, *supra*. In this sense, the determination that governmental action constitutes a taking is actually a conclusion that the public at large rather than the landowner must in all fairness and justice bear the burden of an exercise of state power in the public interest. *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

While this Court has not been able to develop any precise formula for determining when "fairness and justice" require compensation, it has upheld various land-use regulations that destroyed or adversely affected real property interests. See, e.g., *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928). Moreover, it seems clear after *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), *Miller* v. *Schoene*, 276 U.S. 272 (1928) and *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962), that this Court will uphold zoning laws (serving a substantial public purpose)

against "taking" challenges even when that governmental action prohibited a beneficial use to which the parcels had previously been devoted and thus caused substantial individualized harm. In so ruling in *Goldblatt* v. *Hempstead, supra,* this Court expressly assumed that the city safety ordinance there which extinguished a long standing and and gravel mining business did not prevent the owner's *reasonable* use of the land since he made no showing of an adverse effect on the value of the property itself. Implied in *Goldblatt,* however, is the conviction by the Court that a real property use restriction may amount to a taking "if not reasonably necessary to the effectuation of a substantial public purpose . . . *or perhaps if it has an unduly harsh impact upon the owner's use of the property.*" *Penn Central Transp. Co.* v. *New York City, supra,* 438 U.S. at 127. (Emphasis supplied.)

Here the trial judge's findings authoritatively establish that Fischer could not put its land to *any* use permitted by the FPCD without excavation, filling and grading. By not only regulating but totally *prohibiting* Fischer's explicit and absolute right under the zoning by-law to use the property for recreation and access, the board's denial of the special permit and the state courts' ratification of that decision have thus prevented Fischer from making *any* use of its property leaving it only with the burden of paying taxes thereon. While Fischer does not at this time question the constitutional propriety of the Town of Concord's police power in enacting the flood plain zoning by-law, it does submit that an unconstitutional taking without compensation has occurred when the board's implementation of that by-law *totally prohibits* Fischer from using the land not for unauthorized purposes but instead for the very purposes allowed as of right by the by-law's provisions! With the state courts' imprimatur, the board has thus achieved its own goal of insuring that the locus

remains in an open, polluted and unimproved condition[11] while, at the same time, violating Fischer's right to use the land as permitted by the by-laws. A dedication of the locus to the public domain without compensation has therefore occurred.

Because, then, Fischer's use of the land has been so thoroughly extinguished by the board's implementation of the flood plain zoning by-law, governmental action in this case has had "an unduly harsh impact on [its] use of the property" within the meaning of *Goldblatt* and *Penn Central* and a taking has clearly been made out.[12] Traditional analyses employed by this Court buttress this conclusion. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-414 (1922), for example, it was stated that a critical factual consideration in determining whether a taking had occurred "is the extent of the dimunition [of property value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.* Since the statute there had the effect of *completely destroying* the mining rights the claimant had reserved from the owners of the surface land, the court held that the statute was invalid as a

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[11] It should be made clear that physical characteristics of Fischer's land results from man-made excavation and grading. That portion of Fischer's land sought to be excavated, filled and graded is an amalgam of flotsam and jetsam that could not be used, removed, filled or cleaned without the board's approval. The areas sought to be excavated, graded and filled were appurtenant to a now abandoned water power works formerly used as a woolen mill. Importantly, Fischer owned the water and flowage rights for the area.

[12] As observed in 2 P. Nichols, The Law of Eminent Domain § 6.1[1] (3d ed. rev. 1976):

> Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation. . . .

taking without just compensation. *Id.* at 414-415. See also *Armstrong* v. *United States*, 364 U.S. 40 (1960) (government's complete destruction of materialmen's lien in certain property held a taking); *United States* v. *Causby*, 328 U.S. 256 (1946) (government's direct overflights destroyed use of claimant's land); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908) (if height restriction makes property wholly useless "the rights of property . . . prevail over the other public interest" and compensation is required).[13] What greater diminution can there be than where, as here, the trial judge's plain findings — however recharacterized by the Appeals Court — establish that Fischer is unable to use its land for *any* purpose permitted by the zoning by-law? The fairness and justice inhering in this Court's taking decisions have never demanded that a private landowner suffer the total destruction of his property rights in favor of the public without being entitled to compensation.

Moreover, the trial judge's determination that Fischer's land was not "worthless" even though it could not be *used* for anything is a glaring contradiction in terms. This Court has clearly held that "the value of property results from the use to which it is put." *Cleveland C.C. & St. L. R.R. Co.* v. *Backus*, 154 U.S. 439, 445 (1894). See also *Branson* v. *Bush*, 251 U.S. 182, 187 (1919). In addition, in *United States* v. *Causby*, *supra*, 328 U.S. at 262, the Court attached no significance to any residual economic value property may possess subsequent to the challenged regulation. Since the *use* of the land was

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[13] Moreover, in *United States* v. *Cress*, 243 U.S. 316 (1917), it was held that repeated floodings of the land in question caused by a water project amounted to a taking. In the same sense, the board, trial judge and Appeals Court here all justified the total prohibition of any use by Fischer in view of the "hazards of flood water inundation which the [FPCD] is intended to provide [against]" (App. 25a). Whether actual or potential, then, flooding has caused a taking here as immediately as in the *Cress* case.

substantially impaired, a taking was deemed to have occurred and compensation was warranted. Even though "[s]ome value would remain," this Court instead focused on the extent of the use affected. 328 U.S. at 262. Fischer thus submits that even if the land was not "worthless," the established uselessness of Fischer's property in the FPCD warranted the conclusion consistent with this Court's decisions that an unconstitutional taking without compensation had occurred.

For these reasons, the Appeals Court decision affirming the denial of the special permit to Fischer to grade and fill its land misapplied relevant constitutional law concerning takings as embodied in this Court's opinions. This misapplication has caused the decision below to conflict with decisions of this Court which establish the standards for determining when an unconstitutional taking without compensation has occurred. This conflict therefore justifies the grant of certiorari to review the judgment and opinion below.

2. The Decision Below Raises an Important Constitutional Question Concerning the Taking of Property under the Fifth and Fourteenth Amendments.

Under the Appeals Court decision, a landowner in Massachusetts no longer has the right — short of outright dispossession by the government — to be reimbursed for land taken not by a zoning regulation but by the application of the zoning regulation, no matter how extensively the uses to which the property may be put are extinguished and regardless of the diminished value of the locus. Here the land was declared useless with little, if any, worth to its owner. Yet the Appeals Court, in a remarkable feat of appellate factfinding, turned each of these findings upside down, imagined without record support some marginal utility for the land and then found that

no taking had occurred. Such a disturbing and unprincipled abnegation of the "taking" language of the Fifth Amendment could only have been made in the context of a serious vacuum of usuable precedent that warrants attention by this Court.[14] There is simply no readily ascertainable criteria for state courts to employ in order to determine whether zoning regulations impinge on constitutionally protected rights.

Because of the differing factual patterns addressed by the Court in dealing with taking claims, then, there is a lack of clear constitutional principle. Fischer therefore respectfully urges this Court to relieve it of the confiscation of its land occasioned by the board's denial of the special permit and to opt now to educe principles which will provide predictable guidance for governments everywhere about the limits of their power. This will avoid the unnecessary cost, delay, uncertainty and injustice that is unfortunately incident to the present case-by-case analysis employed by this Court. Such a redefinition of the constitutional contours of zoning regulations will also serve to invalidate the bewildering and biased precedent in Massachusetts which has allowed the result here to stand. The words of the Fifth Amendment must mean something; and it is the responsibility of this Court — rather than various state courts — to say what that meaning is. This is the time for such a redefinition of the limits of government

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[14] The appellate courts of Massachusetts have for the most part mirrored this Court's case by case approach to resolve land-use regulation problems in constitutional terms. See, e.g., *Sturges* v. *Chilmark*, Mass. Adv. Sh. (1980) 815, 821, 825 n.9; *Turnpike Realty Co.* v. *Dedham*, 362 Mass. 221, 236-237 (1922); *MacGibbon* v. *Board of Appeals of Duxbury*, 356 Mass. 635, 641 (1970); *Commissioner of Natural Resources* v. *S. Volpe & Co. Inc.*, 349 Mass. 104, 107-108 (1965); *Aronson* v. *Sharon*, 346 Mass. 598, 604 (1964); *Mile Road Corp.* v. *Boston*, 345 Mass. 379, 383 (1963); *Pittsfield* v. *Oleksak*, 313 Mass. 553, 555-556 (1943); *Davidson* v. *Commonwealth*, Mass. App. Ct. Adv. Sh. (1979) 2103, 2109 n.7.

confiscation through zoning laws. It is an important question desperately deserving of this Court's attention.

If the town of Concord wishes to preserve the flood plain in its natural, unspoiled condition for the enjoyment, protection and benefit of the public, there are various ways by which it may accomplish that goal. It may acquire the flood plain area or easements therein by gift, purchase, or by takings by eminent domain under G.L. c. 79 and 80A, for any one of several authorized public purposes. But it may not confiscate private property under the guise of denying Fischer's request for a special permit to grade and fill his land. Rendered totally useless and nearly worthless in every practical sense, the land ought not to be Fischer's tax burden alone. A redefinition of the law concerning the constitutionality of land use regulations by this Court would foster such a result.

This uncertain and ambiguous state of the law in Massachusetts and elsewhere thus raises serious and important constitutional issues justifying the issuance of a writ of certiorari to review the judgment and opinion of the Massachusetts Appeals Court.

Conclusion.

For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the Massachusetts Appeals Court.

Respectfully submitted,

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Appendix.

TOWN OF CONCORD

BOARD OF APPEALS

PETITION of S. KEMBLE FISCHER REALTY TRUST under Section 4.2 for a permit to fill a portion of the land located on Main Street and Pond Lane (lots 1, 2 and 4) in West Concord near Damon Mill.

Record of Proceedings

The Petitioner-Appellant S. Kemble Fischer Realty Trust of 89 State Street, Boston, Mass. filed with the Board of Appeals on April 8, 1974 a petition, copy of which is hereto annexed.

The Board determined that the following constituted the parties interested in the petition and the owners of all property affected thereby, as they appear upon the most recent tax list, viz:

Old Colony Trust Co. of Boston
McIninch Realty Trust
Richard B. & Mary Louise Kalin
Martin Coffey & Son, Inc.
Quadro Stations, Inc.
Henry O. Damon
David L. & Susan E. Atwater
Robert L. Cousins
William H. & Judith E. Alexander
Concord Woodworking Co., Inc.
Roger S. & Ruth H. Carter

The Board set the first day of May, 1974, at 8:00 o'clock, P.M. as the time, and the Court Room, Town House, Concord, Massachusetts, as the place of the public hearing upon said petition.

The following notice was published in the Concord Free Press in the issue of 4/11/74 and 4/18/74, and a copy of said notice was sent by mail to each of the aforementioned parties in interest and property owners:

TOWN OF CONCORD
BOARD OF APPEALS
TOWN HOUSE
NOTICE

April 9, 1974

The Board of Appeals will hold a public hearing on Wednesday, May 1, 1974, at 8:00 o'clock in the evening in the Hearing Room, Town House on petitions for variance of the Sign By-Law, Zoning By-Law and/or applications for special permits as follows:

1. KNIGHTS OF COLUMBUS, under Section 5 (F) (12) to conduct their annual "Town Fair" at the Concord-Carlisle High School grounds from Tuesday, June 26 through Saturday, June 29, 1974.

2. GERALDINE WETZELL, under Section 5 (H) to continue providing baby-sitting services from her residence at 184 Belknap Street.

3. RUSSELL BUKER, under Section 5 (g) to allow a stable on his premises at 380 Lindsay Pond Road.

4. RICHARD L. PETERSON, under Section 5 (H) to continue using a portion of his home at 187 Old Bedford Road as an office for public accounting and consulting.

5. CONCORD ACADEMY, under Section 5 F (13) to use the campus along Main Street for a summer sports program from June 24, 1974 to August 2, 1974.

6. H. MALCOLM TICKNOR, under Section 5 (g) to allow a stable on his premises at 15 Annursnac Hill Road.

7. S. KEMBLE FISCHER REALTY TRUST, under Section 4.2 for a permit to fill a portion of the land location on Main Street and Pond Lane (lots 1, 2, & 4) in West Concord near Damon Mill.

By order of the
BOARD OF APPEALS
James J. McNeil
Chairman

C2T 4/11 & 4/18

The following persons appeared in opposition thereto:

Harry Stoddard, Esq.
William McIninch
Roy MacPherson
Henry Damon

The Planning Board reported its action on the matter as follows:

See copy of the Planning Board letter, dated July 10, 1974 attached hereto.

See copy of the Board of Health letter, dated November 27, 1974 attached hereto.

The Board thereupon took the following action:

VOTED: To deny the petition of S. Kemble Fischer Realty Trust for a special permit, under Section 4.2 B (7) of the Concord Zoning By-law, to fill portions of 3 lots of its land located in the Flood Plain Conservancy District, the 3 lots being shown as "Parcels 4 and 1-B" on a plan entitled "Plan Showing Proposed Fill on Land Owned by S. Kemble Fischer Realty Trust" dated February 6, 1974, revised June 6, 1974, Sheet 2 of 2, by David W. Perley, Civil Engineer, and "Lot 2" on a plan entitled "Proposed Septic System for S. Kemble Fischer Realty Trust" dated January 21, 1974, revised June 6, 1974, Sheet 1 of 2, by David W. Perley, Civil Engineer, which plans were submitted by Petitioner.

The members of the Board voted thereon as follows:

James J. McNeil	Negative
Robert G. Anderson	Negative
A. Richard Brooks	Negative

The Board assigns the following as the reasons for the foregoing finding, ruling and decision:

S. Kemble Fischer Realty Trust ("the petitioner") is seeking a special permit to allow it to fill portions of 3 of its lots of land which are in the Flood Plain Conservancy District. The 3 lots are shown as "Parcels 4 and 1-B" on a plan entitled "Plan Showing Proposed Fill on land owned by S. Kemble Fischer Realty Trust" dated February 6, 1974, revised June 6, 1974, Sheet 2 of 2, by David W. Perley, Civil Engineer, and "Lot 2" on a plan entitled "Proposed Septic System for S. Kemble

Fischer Realty Trust" dated January 21, 1974, revised June 6, 1974, Sheet 1 of 2, by David W. Perley, Civil Engineer, which plans were submitted by petitioner, and as Parcels numbered 2364, 2363-2 and 2692-2, respectively, on the Town Assessors' maps. (The lots will hereinafter be referred to collectively as "the lots" or "petitioner's lots" and individually by petitioner's designations.)

The Zoning By-law restricts uses which may be made of land within the Flood Plain Conservancy District. Certain uses are permitted however, as a matter of right under Section 4.2 B (1) - (6). Additionally, under Subsection B (7), this Board may, after a public hearing with due notice, issue a special permit when certain conditions are met for any use which would otherwise be permitted if the subject land were not in the Flood Plain Conservancy District.

Those conditions are:

1) The land is not subject to flooding or not unsuitable because of drainage conditions for any such use;

2) Such use will not interfere with the general purposes for which the Flood Plain Conservancy District has been established; and

3) Such use would not be detrimental to the public health, safety or welfare.

The Board is of the opinion that the petition in this matter should be denied because the foregoing conditions have not been proven to its satisfaction.

Petitioner's proposed plan involves filling 3,200 cubic yards on Parcel 4, 5,000 cubic yards on Parcel 1-B and 1,100 cubic yards on Lot 2. The plan would have the effect of raising certain portions of the lots out of the Flood Plain Conservancy District and into the District in which they would otherwise be

except for its existence. (Parcels 4 and 1-B would be entirely within an Industrial District and Lot 2 would be partially within a Business District and partially within a Residence C District were it not for the existence of the Flood Plain Conservancy District.)

Petitioner's proposed use of Parcel 4 and 1-B is as a general recreation area. That is a use permitted without special permit both in the Flood Plain Conservancy District and in an Industrial District. Section 4.2 provides that "No land fill or dumping shall be permitted in any part of the Flood Plain Conservancy District except such as may be expressly included as a part of any special permit issued under the provisions of Section 4.2 B (7)."

No such special permit is required for petitioner's proposed use of the Lots in this way and no convincing reason was advanced for the necessity of any fill for this use. Additionally, it is the belief of the Board that filling within the Flood Plain Conservancy District is intended to be on an extremely limited basis and allowed only when it will not be in conflict with the general purposes for the establishing the Flood Plain Conservancy District. We do not believe it is the intent of the By-law to allow us to permit major portions of land to be filled and thereby raised out of the Flood Plain Conservancy District, and thus become no longer subject to the controls which would otherwise exist relative to that land.

Section 4.2 A says: The purpose of the Flood Plain Conservancy District is to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation; and for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods.

We believe allowing fill to be placed upon those portions of parcels 4 and 1-B would interfere with the protection against the hazards of flood water inundation which the Flood Plain Conservancy District is intended to provide. The By-law is designed not only to protect the occupants of the site (if developed) from such hazards but also the occupants of other sites in the area, and the proposed filling would, in our opinion, lessen this protection.

With respect to Lot 2 it was stated that the primary purposes of the fill were to correct a pollution problem in the canal and to provide acces to the rest of Lot 2. It has not been proven to our satisfaction that the canal is not subject to flooding or not unsuitable because of other drainage conditions to allow this filling to take place.

Moreover, the Board of Health reported, and this Board believes, that the filling in of this one portion of the existing canal would be detrimental to the public health in respect to increased problems with pollution and stagnation in the adjacent portion of the canal under Route 62 and on land not owned by Petitioner (Parcel 2363-1 on the Assessors' maps).

Therefore, the petition is denied in all respects.

JAMES J. MCNEIL
ROBERT G. ANDERSON
RICHARD BROOKS

Board of Appeals, Town of Concord, Mass.
Filed with Town Clerk 12/30/74

A TRUE COPY: Attest
MARJORIE S. STETSON
Secretary, Board of Appeals

SECTION 4.2 FLOOD PLAIN CONSERVANCY DISTRICTS

A.B.
FLD PLN CONS DIST
'62

A. The purpose of the Flood Plain Conservancy District is to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation; and for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods. Purpose '68

B. Use. In the Flood Plain Conservancy District no building or structure shall be erected, constructed, altered, enlarged or moved, nor shall any premises be used, for any purposes except: Use

(1) Conservation of water, plants and wild life; conservation

(2) Recreation, including play areas, nature study, golf, boating, fishing, and hunting where otherwise legally permitted; recreation

(3) Grazing and farming, including truck gardening and harvesting of crops, and drainage, irrigation, and dams incidental thereto; farming drainage

(4) Forestry; forestry

(5) Telephone, telegraph, power and gas transmission, municipal water and sewer lines; utility

(6) Any of the following uses provided the Board of Appeals shall rule after a public hearing with due notice that such special use

use is not detrimental or injurious to the neighborhood and, in the case of buildings or structures, that such building or structure shall be designed, placed and constructed to offer a minimum obstruction to the flow of water and shall be firmly anchored to prevent floating away and thus threatening other buildings or blocking of openings in restricted sections of the water course below;

(a) Non-residental buildings and structures, such as

(1) Barns, stables, or kennels for shelter, breeding, hiring, or sale of animals and for storage of crops raised on the premises. stables

(2) Boathouses, duck-walks, and landings-including renting of boats or canoes and recreation equipment and sale of bait. boathouses

(3) Temporary refreshment stands or stands for the sale of produce raised on the premises. stands

(b) Amusement enterprises such as golf range, pony rides, circus, fairs, carnivals and similar events, not including any permanent structures and subject to other Town By-Laws and applicable regulations. amusements

(c) Dams, changes in water courses or drainage works but only as part of an over-all drainage basin plan constructed or authorized by a public agency. drainage

(d) Temporary storage of materials or equipment. storage

special permit

(7) If any land in the Flood Plain Conservancy District is proven to the satisfaction of the Board of Appeals, after the question has been referred to and reported on by the Planning Board and the Board of Health, as being in fact not subject to flooding or not unsuitable because of drainage conditions for any use which would otherwise be permitted if such land were not, by operation of this section, in the Flood Plain Conservancy District, and that the use of such land for any such use will not interfere with the general purposes for which Flood Plain Conservancy Districts have been established, and will not be detrimental to the public health, safety or welfare, the Board of Appeals may, after a public hearing with due notice, issue a special permit for any such use.

land fill

No land fill or dumping shall be permitted in any part of the Flood Plain Conservancy District except such as may be expressly included as a part of any special permit issued under the provisions of Section 4.2B(7) above.

Except as provided above, there shall be in the Flood Plain Conservancy District:

drainage

No drainage other than flood control works by an authorized public agency;

No damming or relocating of any water course except as part of an over-all drainage basin plan;

bldg

No building or structure;

No permanent storage of materials or equipment.

existing permits

Any use of premises which required the issuance of a special permit by, or approval by, the Board of Appeals or the issuance of a permit by the Building Inspector shall be deemed a permitted use under this section to the extent of such approval or permit if, prior to the date this section is adopted by the vote of the Town Meeting, such approval was given or such permit was issued. Petitions for an approval or for a permit pending as of such date of adoption by Town Meeting shall, as they relate to uses effected by this section, be governed by the by-law in effect as of the date of the petition.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
No. 75-339

KEMBLE FISCHER REALTY TRUST

v.

JAMES J. McNEIL ET AL.,
AS THEY ARE MEMBERS OF THE BOARD OF APPEALS
OF THE TOWN OF CONCORD.

Statement of the Case, Issues, Findings of Fact, Rulings of Law and Decision, as Amended.

Statement of the Case.

This case involves an appeal by the S. Kemble Fischer Realty Trust, hereinafter referred to as "Fischer" to the Superior Court under § 21 of c. 40A of the General Laws.

On April 8, 1974 petitioner sought a special permit (pursuant to § 4 of c. 40A and § 4.2 of the Concord Zoning By-Laws) from the Concord Board of Appeals, hereinafter referred to as "Board", to fill and grade a portion of land on the banks of the Assabet River in Concord in an area designated as Flood Plain Conservancy District.

On May 1, 1974, a public hearing was held on the petition and on December 30, 1974 the Board denied the permit and filed a copy of its decision with the Concord Town Clerk.

On January 20, 1975 petitioner filed a complaint in Middlesex Superior Court seeking to set aside the Board's decision and to direct the Board to issue a special permit with appropriate safeguards.

In December, 1977 this appeal was tried, without a jury, in the Middlesex Superior Court. On January 1, 1978 the Court went to the situs in Concord and examined the dam, the canal and the area involved.

Issues.

1. Was the Board of Appeals of the Town of Concord acting within its authority under the Concord Zoning By-Laws in denying Fischer's petition to fill portions of its land located in the Town's Flood Plain Conservancy District?

2. Did the Board violate the open meeting law so as to render its denial of a special permit null and void?

3. Was the Board's decision not rendered timely so as to be null and void as a matter of law?

4. Was the Board's denial of a special permit a taking of property without due process in violation of the Fourteenth Amendment of the Constitution of the United States?

Findings of Fact.

1. Fischer owns five parcels of land in West Concord on or near Main Street and Pond Lane. These parcels are designated on Section C-10 of the Town Assessor's map as Parcels 2364, 2363-2, 2692-1 and 2692-2. These same parcels are also referred to as follows:

a. Parcel 1-3 (Assessor's Parcel 2363-2) containing 0.7 acres;

b. Parcel 2 (Assessor's Parcel 2692-2 and 3) containing 12,623 and 27,600 square feet;

c. Parcel 4 (Assessor's Parcel 2364) containing 43,494 square feet;

d. Parcel 5 (Assessor's Parcel 2365) containing 2.3 acres;

e. Parcel 7 (Assessor's Parcel 2692-1) containing 934 square feet.

2. The location of the Fischer land can also be described with reference to the Damondale Dam (also known as Damon's Mill Dam) which is immediately adjacent to an old factory building at Pond Lane and Main Street. This structure was acquired by its present owner, William Sullivan, on September 1, 1977, and is known as "the Mill" or "the cold storage building."

3. A canal, serving as a bypass for the dam, was constructed to conduct water under the mill. The flowing water would provide power for the mill and would then empty back into the Assabet River. The canal is partly on Fischer land and partly on Sullivan's land.

4. Fischer bought the land under discussion in 1973 from John H. Lord who had owned it for the previous forty years. Fischer began to cut trees. On September 26, 1973 the Building Inspector for Concord wrote Norman Ostroff, a trustee of Fischer, reminding him that it would be necessary to get a permit to excavate or build.

5. On April 8, 1974 Attorney John H. Gahan, acting for Fischer, applied to the Concord Board of Appeals for a permit to fill that portion of Fischer land on the Assabet River both above Damon's Mill Dam to an elevation of 130 feet and land below the Dam to an elevation of 123 feet. After the proposed landfill, no part of the Fischer land would remain in the Con-

cord Flood Plain Conservancy District as defined in Section 1E of the Concord Zoning By-Law of 1973 as amended. In addition, Fischer wanted to fill part of the canal.

6. On May 1, 1974, the Board held a hearing. Costello presented to the Board a plan entitled, "Plan Showing Proposed Fill on Land Owned by S. Kemble Fischer Realty Trust" dated February 6, 1974 by David W. Perley, Civil Engineer.

7. On June 3, 1974 Costello again met with the Board of Appeals and, at their request, on June 6 filed a revised plan.

8. On or about July 1, 1974, Thomas F. Costello became co-trustee of the S. Kemble Fischer Realty Trust and on or about August 26, 1977, Thomas F. Costello became sole trustee.

9. On or about July 10, 1974 the Planning Board filed with the Board its opinion as to the special permit application. The Planning Board spelled out several reasons why it felt the application to fill within the Flood Plain Conservancy District should be denied. The July letter was attached to the December 30, 1974 decision of the Board.

10. On or about November 27, 1974, the Board of Health filed with the Board of Appeals its opinion. It was the consensus of the Board of Health that the filling in of this portion of the existing canal would be "detrimental to the public health in respect to increased problems with pollution and stagnation" in the unfilled portion of the canal not owned by the petitioner. (This November 27th letter was also attached to the Board's decision of December 30, 1974).

11. The December 30, 1974 decision of the Board of Appeals denying the application was filed with the Concord Town Clerk.

12. On January 20, 1975 Fischer filed a complaint in Middlesex Superior Court appealing the Board's decision.

13. The Court viewed the canal on January 1, 1978 and observed in the canal some water, ice, a fallen section of a tree

and some other debris. Water flowed through the canal. Sullivan testified that the water was flowing through the canal in December, 1977. He agreed that debris and trash were in the canal. Nancy Hofztedt, a civil engineer with Camp, Bresser and McKee, Inc., testified that she had visited the site in September, 1976 and again in September, 1977 and on both occasions found debris and stagnant pools of water in the canal. John H. Lord, a previous owner of the Fischer property, wrote the Board of Appeals (Exhibit 8) recommending that both ends of the canal be filled to eliminate flooding in the basement of the mill in the spring as well as stagnant foul water in the canal in the summer. Thomas Costello testified the north end of the canal is now blocked and the canal contains fecal matter. He felt the filling of the canal would remove the present source of pollution. Joseph McElroy, Chief of Materials Testing and a concrete specialist with the United States Army Corps. of Engineers, inspected the site in March, 1971. He testified that he found the canal dry, rundown and filled with debris. He testified that the canal might have a flood control valve if put to use as a bypass canal.

14. Most of the land which Fischer seeks permission to fill is subject to flooding.

15. There was no evidence introduced by Fischer as to what use Fischer would make of the canal after the proposed fill other than Fischer's reference to access between Parcels 7 and 2. There was no guarantee that the land would not be converted to some other use.

16. No evidence was introduced by Fischer as to proposed drainage after the land was filled in.

17. The area which Fischer wants to fill is subject to seasonal and/or periodic flooding.

18. Above the dam the upstream elevation is 122 feet (above sea level) and below the dam the downstream elevation is 120.2 feet. The river bed upstream is 120 feet and down-

stream is 119 feet. The spill way of the dam is 28 feet wide. The dam itself is 127 feet above sea level. Although the dam itself is partly broken and needs repairs, it still impounds the water and would, during a spring flood, back up water behind it. If the dam and its spillway were repaired, the canal would serve the purpose of removing pressure from the dam and providing an additional outlet for the river flow. Even without such repairs, the canal serves this function. (Joseph A. McElroy of the U.S. Army Corps. of Engineers and an expert in materials and concrete recommends that the dam be r paired).

19. By filling in the banks of the river and sealing off the upstream end of the canal, the velocity of water flow over the dam would be increased at times and the changes are increased for eroding the present dam, washing out existing fill and actually changing the course of the river. Further, the size of the present basin and the present flood plain area behind the dam would be reduced.

20. Experts on behalf of both parties differ as to the amount of fill necessary to accomplish Fischer's plans but there appears to be real hazards to any fill operation. If porous, the fill would absorb water and eventually wash away. If not porous, the fill would act like a dam exerting additional pressure on the existing dam and lessening the absorbent, flood control quality of the present basin above the dam. The proposed filling would reduce by some 5,000 cubic yards the compensatory water storage behind the dam and shift the course of the river. Fischer at no time introduced any evidence as to how the relocating of the course of the river resulting from the filling operation would be part of any "over-all drainage basin plan." Nor did Fischer indicate how the reduced storage capacity of the basin would be compensated for by adding additional storage capacity to some other part of the basin.

21. If Fischer filled his land it would adversely affect the land of others.

22. Filling by Fischer will increase the upstream and downstream rate of flow and, in the event of a 100 year flood, would increase the likelihood of water backing up into the canal and flooding into the mill building. The filling might — and on this point the Court is not convinced — increase the upstream water elevation.

23. The present canal serves a valuable purpose as an additional water course for flowing water to escape downstream, particularly during flooding periods. The canal would be particularly useful as a dam bypass in the event the dam is repaired at some future time.

24. Fischer's proposed landfill would increase the hazard of flooding in the Assabet River system.

25. Filling the upstream end of the canal would contribute to stagnation and pollution in the downstream unfilled end of the canal and would be detrimental to the public health.

26. Significant portions of Parcels 2, 1B and 4 are within the area which must be kept free of fill in order to carry a 100 year flood.

27. Fischer did show that it could not use its land as it is now for access, general recreation or other uses permitted within the Flood Plain Conservancy District.

Rulings of Law.

1. The Board of Appeals of the Town of Concord was acting within its authority under the Concord Zoning By-Laws in denying Fischer's petition to fill portions of its land.

2. There was no evidence that the Board of Appeals violated the open meeting law. (Section 11A 1/2 of Chapter 30A).

3. The decision of the Board of Appeals was timely rendered and filed after all testimony of witnesses, exhibits and correspondence from interested town boards had been received by the Board. However, even a late filing by the Board of its decision would not invalidate the decision since the requirement of a timely decision (§ 18 of c. 40A, as amended) is directory not mandatory. *Cullen* v. *Building Inspector of North Attleborough*, 353 Mass. 671, 680 (1968); *Kiss* v. *Board of Appeals of Longmeadow*, 355 N.E.2d 461 (1976) (dictum).

4. The Board of Appeals has the discretion whether or not to grant a variance but it must act fairly and reasonably on the evidence presented and in accordance with the purposes of the Enabling Act and the Zoning By-Laws. The decision of the Board will not be disturbed unless based on a legally untenable ground or unless capricious or arbitrary. *MacGibbon* v. *Board of Appeals of Danbury*, Mass. Adv. Sh. (1976) 143.

5. The present case is an appeal under § 21 of c. 40A and it was tried and heard by this Court *de novo* and the findings, rulings and decision of this Court are based upon the testimony, exhibits and evidence introduced in the Superior Court trial. See *Devine* v. *Zoning Board of Appeals of Lynn*, 332 Mass. 319, 321 (1955); *Blackman* v. *Board of Appeals of Barnstable*, 334 Mass. 446, 449 (1956).

6. I rule as a matter of law that the Concord Board of Appeals did *not* exceed its authority in denying Fischer's petition.

7. The grant of a permit to Fischer was discretionary with the Board of Appeals under the Massachusetts Zoning Enabling Act (G.L. c. 40A as amended) and the Concord Zoning By-Law (§ 4.2B(T)).

8. The granting of a permit to Fischer would jeopardize the public health and safety, increase the danger to people and property by flood waters, and expose the Town of Concord and the Commonwealth and property owners in the vicinity of

the Damon Mill Dam upstream and downstream to costs whic' may be incurred along the water course of the Assabet River or in areas subject to flooding by Assabet River, all of which are contrary to the general purpose of Flood Plain Conservancy District as described in the Concord Zoning By-Laws (Section 4.2 Flood Plain Conservancy Districts).

9. The Court treats Fischer's petition for a special permit as a request for a variance (see *Pendergast* v. *Board of Appeals of Barnstable*, 331 Mass. 555, 556 (1954)) in that the burden is on Fischer to show it should be expected from the general regulatory pattern (Concord Zoning By-Laws, particularly Section 1E and 4.2). Fisher has not sustained this burden.

10. The Concord Zoning By-Law particularly describes the Flood Plain Conservancy District, in part, as

> all land along . . . that part of the Assabet River below Damon's Mill Dam, which is at or below elevation 123 feet, U.S.G.S. datum . . . [and] all land along part of the Assabet River above Damon's Mill Dam, which is at or below elevation 130 feet, U.S.G.S. datum.

11. The proposal of Fischer to fill land plainly violates the provisions relating to land fill and drainage set forth in § 4.2 of the Concord Zoning By-Law.

12. The low-lying portions of Fischer's land are in the Concord Flood Plain Conservancy District as in effect at all times material hereto.

13. The Board of Appeals in hearing and in denying Fischer's petition complies with the requirements of G.L. c. 40A as effective in 1974.

14. The denial by the Board of Appeals of Fischer's request for a special permit was not whimsical, capricious or arbitrary.

15. The denial of the permit does not render Fischer's land worthless but may, in fact, deny Fischer the opportunity to maximize its profit on the use of the land. In this case as in many other instances, the right of an individual must be subordinate to the health and safety of the community and such subordination is not a taking without compensation and without due process so as to violate the Fourteenth Amendment to the United States Constitution.

16. The Board of Appeals did not exceed its authority.

DECISION AND ORDER

It is hereby ORDERED and ADJUDGED that:

(1) The Concord Board of Appeals' denial of the plaintiff's request for a special permit did not exceed its authority.

(2) The denial was not only lawful but it was, under the circumstances, required.

(3) The decision of the Board is AFFIRMED.

(4) The appeal from the decision shall be dismissed as to all defendants.

By the Court

Andrew G. Meyer
Justice of the Court
c. 303 of the Acts of 1976

Entered: June 26, 1978
and as amended November 29, 1978

Entered: December 11, 1978.

S. KEMBLE FISCHER REALTY TRUST *vs.* BOARD OF APPEALS OF CONCORD.

Middlesex. January 24, 1980. — March 28, 1980.

Present: PERRETTA, ROSE, & KASS, JJ.

Practice, Civil, Admissions, Record. *Zoning*, Special permit, Flood plain zoning. *Constitutional Law*, Zoning.

CIVIL ACTION commenced in the Superior Court on January 20, 1975.

The case was heard by *Meyer*, J., a District Court judge sitting under statutory authority.

Thomas F. Costello for the plaintiff.

Paula Bonnell for the defendant.

KASS, J. Following denial by the board of appeals of Concord (the board) of a special permit to fill land in a flood plain zone, the plaintiff sought review in the Superior Court under G. L. c. 40A, § 21, as amended through St. 1974, c. 78, § 1.[1] In that proceeding the plaintiff was also unsuccessful.

1. On appeal before us the plaintiff attacks adverse findings of the trial judge on the ground that they are inconsistent with facts contained in responses by the board to a request for admissions pursuant to Mass.R.Civ.P. 36(a), 365 Mass. 795 (1974). This raises a threshold procedural question because, so far as appears from the record, the board's admissions were never brought to the attention of the trial

[1] Under the recodification of the zoning enabling act inserted by St. 1975, c. 808, § 3, the provisions relating to judicial review of decisions of a board of appeals or other special permit granting authority appear in G. L. c. 40A, § 17.

judge until after entry of judgment.[2] As with other discovery (e.g. interrogatories, depositions), the existence of facts developed in a response to a request for admissions requires introduction into the record in order for the party who relies upon it to obtain its benefit, including, of course, reference to it on appeal. "To use an admission at trial, one merely reads it into the record prior to the close of the evidence," at which time the opposing party may test the ability of the admission to withstand evidentiary objection. Smith and Zobel, Rules Practice § 36.9 (1975). The mere fact that a paper is found among the files in a case does not make it part of the record which the court must consider. *Avant, Inc.* v. *Polaroid Corp.*, 441 F.Supp. 898, 900 n.2 (D. Mass. 1977), aff'd 572 F.2d 889 (1st Cir.), cert. denied, 439 U.S. 837 (1978). Cf. *Rice* v. *United Air Lines, Inc.*, 10 F.R.D. 161 (N.D. Ohio 1950). See 8 Wright and Miller, Federal Practice and Procedure § 2264 (1970); 9 Moore's Federal Practice, Par. 210.04[1] (1975). Not only can a trial judge not be expected to take into account discovery material never adverted to, but the party against which it is to be used has no opportunity to test its evidentiary competence, to illuminate its significance, and to move under Mass.R. Civ.P. 36(b), 365 Mass. 796 (1974), for withdrawal or

[2]The board attempted to establish the fact that the admissions were never drawn to the attention of the judge by including in its brief an affidavit of counsel to that effect. The proper method for so doing is by a motion to a single justice of this court to enlarge the record appendix, or prior to argument, to ask leave, pursuant to Mass.R.A.P. 18(a), as amended July 1, 1979, Mass. (1979), to refer to portions of the record omitted from the appendix. An identical affidavit, however, was filed by the board with the trial court, and the appellant did not contest the facts asserted therein. See *United States Fid. & Guar. Co.* v. *N.J.B. Prime Investors*, 6 Mass. App. Ct. , n.3 (1978) (Mass. App. Ct. Adv. Sh. [1978] 720, 721 n.3). We are not bound by the failure of the parties to include that document in the appendix, though we are not required to go beyond the appendix. *Ainslie* v. *Ainslie*, 6 Mass. App. Ct. , n.3 (1978) (Mass. App. Ct. Adv. Sh. [1978] 1122, 1126 n.3). Cf. *Kunen* v. *First Agricultural Natl. Bank of Berkshire County*, 6 Mass. App. Ct. (1978) (Mass. App. Ct. Adv. Sh. [1978] 1111).

amendment of the admission.[3] Discovery material on file but not called to the attention of the trial judge enjoys no better standing on appellate review than a motion filed but never presented, or evidence in possession or control of a party which was not introduced. See *McNamara* v. *Westview Building Corp.*, 4 Mass. App. Ct. 670, 672 (1976); *Kinchla* v. *Welsh*, Mass App. Ct. , n.6 (1979).[a] In principle, attempting to argue the significance of material not before the court below is the same as arguing on appeal a point of law not raised before the trial judge. An attempt so to do brings nothing before the appellate court. See *Previte* v. *Butcher Boy Steak House, Inc.*, 3 Mass. App. Ct. 703 (1975); *Bendetson* v. *Coolidge*, Mass. App. Ct. , (1979).[b] While Mass.R.A.P. 8(a), as amended, 367 Mass. 919 (1975), includes all original papers on file in the record on appeal and Mass.R.A.P. 13(a), 365 Mass. 864 (1974), permits parties to include in the record appendix to the appellant's brief any part of that record, the right of parties to have an appellate court consider a paper is circumscribed, for the reasons stated, by whether it was introduced into the record of proceedings before the trial judge.

2. Concerning the consequences of the plaintiff's construction proposal, the judge made detailed findings of fact, including that: most of the land which the plaintiff sought permission to fill is subject to flooding; the proposed filling of a canal by the plaintiff would defeat the drainage function which the canal served; the velocity of water flow over a dam in the Assabet River would be increased such that erosion of an existing dam, washing out of existing fill and a change in the course of the Assabet River were likely; compensatory water storage in the locus would be reduced; the land of others would be adversely affected; and filling the upstream end of the canal would contribute to stagnation

[3] Unless the court on motion permits withdrawal or amendment of the admission, any matter admitted under Rule 36 is conclusively established.

[a] Mass. App. Ct. Adv. Sh. (1979) 1858, 1863 n.6.

[b] Mass. App. Ct. Adv. Sh. (1979) 1271, 1280.

and pollution in the downstream unfilled end, causing detriment to the public health. This sampling of the judge's findings does not exhaust his compilation of what was likely to go wrong if the plaintiff obtained the permit it wanted. We do not set aside findings of fact of a trial judge unless clearly erroneous, Mass.R.Civ.P. 52(a), 365 Mass. 816 (1974), and nothing in the record would warrant us in doing so in this case. Parenthetically we observe that none of the admissions of the board to which the plaintiff refers (relating to the existence of certain plans) were incompatible with the judge's findings.

These findings amply support the judge's determination that the board acted within its authority in denying the plaintiff the special permit it sought. Under the applicable zoning by-law provision, § 4.2B(7), no land fill was permitted "in any part of the Flood Plain Conservancy District" without a special permit, and no special permit was to issue unless it were "proven to the satisfaction of the Board of Appeals, after the question has been referred to and reported on by the Planning Board and the Board of Health, as being in fact not subject to flooding or not unsuitable because of drainage conditions . . . and that the use . . . will not be detrimental to the public health, safety or welfare." The planning board of Concord reported that the proposed fill "would interfere with the protection against the hazards of flood water inundation which the Flood Plain Conservancy District is intended to provide," and the board of health reported that "the filling in of this one portion of the existing canal would be detrimental to the public health in respect to increased problems with pollution and stagnation in the adjacent portion of the canal . . ."

No one, of course, has an absolute right to a special permit, *Humble Oil & Refining Co.* v. *Board of Appeals of Amherst*, 360 Mass. 604, 605 (1971), and cases cited, and the board has the power to deny a permit as long as its decision is neither based on a legally untenable ground, nor is unreasonable, whimsical, capricious or arbitrary. *Pioneer Home Sponsors, Inc.* v. *Board of Appeals of Northampton*,

1 Mass. App. Ct. 830, 831 (1973). In view of the reports received from the planning board and the board of health, it can hardly be suggested that the board's decision in this case suffered from any of those infirmities.

3. The plaintiff asserts that the Concord flood plain zoning by-law is unconstitutional as applied because it leaves the plaintiff without any practical use of its property and, therefore, amounts to a taking by eminent domain without just compensation. Compare *Commissioner of Natural Resources* v. *S. Volpe & Co.*, 349 Mass. 104, 109-110 (1965). After *Turnpike Realty Co.* v. *Dedham*, 362 Mass. 221 (1972), cert. denied, 409 U.S. 1108 (1973), the prospects for the plaintiff's assault on this score are meagre. That decision forecloses the argument that the exceedingly limited use which a flood plain zoning by-law may leave to the owner of land constitutes a de facto taking. *Id.* at 235-237. To escape the force of the *Turnpike Realty* case, the plaintiff emphasizes a finding of the judge that the plaintiff could not use its land "as it is now for access, general recreation or other uses permitted within the Flood Plain Conservancy District." The judge also found (although he called it a ruling of law) that the plaintiff's land was not worthless, which we read as a determination that the locus was not without residual economic utility. It is by no means clear from the record that the plaintiff could not use that portion of its land in the flood plain zone for some purpose which did not require filling, for example to enhance that portion of its land which is outside the flood plain. See *Mile Road Corp.* v. *Boston*, 345 Mass. 379, 383 (1963). As in *Turnpike Realty Co.* v. *Dedham*, 362 Mass. at 235, the land owner in this case is substantially restricted but "such restrictions must be balanced against the potential harm to the community." The likelihood of palpable damage to the surrounding area was considerable. Thus, as applied, the Concord by-law is an exercise of the police power which "regulates use of property because uncontrolled use would be harmful to the public interest" while "[e]minent domain, on the other hand, takes private property because it is useful

to the public." *Turnpike Realty Co.* v. *Dedham*, 362 Mass. at 235, quoting from *Vartelas* v. *Water Resources Commn.*, 146 Conn. 650, 654 (1959). *Davidson* v. *Commonwealth*, Mass. App. Ct. , (1979).[c]

4. There is no merit to the plaintiff's contention that a thirty-foot strip of its land is exempt from the flood plain controls because § 1.B of the zoning by-law permits an owner whose lot straddles a zoning district line to extend the less restrictive use for a distance of thirty feet into the more restrictive district. It is apparent that the Flood Plain Conservancy District is a so-called overlay district imposed over the underlying use district. Whether land is subject to the flood plain restrictions or is subject merely to the conditions of the underlying zone is a function of the grade of the land. As to land below the grades specified in § 1E of the by-law, the flood plain controls override the controls of the underlying zone.

Judgment affirmed.

[c] Mass. App. Ct. Adv. Sh. (1979) 2103, 2111.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, May 29, 1980.

Order.

It is hereby ORDERED, that the following Applications for Further Appellate Review are denied:

M-1505 (Opp.) COMMONWEALTH *v.* RICHARD A. CEPULONIS
Worcester Superior Court Nos. 54658, 54659
Appeals Court No. A.C. 79-733
Motion to File Application Late — Allowed
Motion to File Opposition Late — Allowed

M-1507 (Opp.) SAMUEL MARKELL, EXR. *v.* SIDNEY B. PFEIFER FOUNDATION, INC.
Suffolk Probate Court No. EQ-329
Appeals Court No. A.C. 77-871

M-1508 S. KEMBLE FISCHER REALTY TRUST *v.* BOARD OF APPEALS OF CONCORD
Middlesex Superior Court No. 75-339
Appeals Court No. A.C. 79-108

M-1512 (Opps.) PEARL R. SCHLEIFSTEIN *v.* MINNIE B. GREENSTEIN ET AL.
Suffolk Superior Court No. 94993
Appeals Court No. A.C. 78-584
Motion to File Application Late — Allowed
Motion to File Application in Excess of Ten Pages for Argument — Allowed

By the Court,
PATRICK J. HURLEY
Clerk

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
No. 75-339

KEMBLE FISCHER REALTY TRUST

vs.

JAMES J. McNEIL ET AL.

Judgment After Rescript.

This action came on for entry of judgment upon receipt of the rescript from the Appeals Court from the Commonwealth of Massachusetts (Rules of Appellate Procedure, Rule 28) and thereupon, upon consideration thereof, it is ORDERED and ADJUDGED:

1. The Concord Board of Appeals' denial of the plaintiff's request for a special permit did not exceed its authority.

2. The denial was not only lawful but it was, under the circumstances, required.

3. The decision of the Board is AFFIRMED.

4. The appeal from the decision shall be dismissed as to all defendants.

Dated at Cambridge, Massachusetts this third day of June, 1980.

PAUL F. MAHONEY
Assistant Clerk